

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

DEANNA TABISH-WEAVER,  
Plaintiff,  
vs.  
UNITED PARCEL SERVICE,  
Defendant.

NO. CV-07-0167-EFS

**ORDER GRANTING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT**

Before the Court, without oral argument, is Defendant United Parcel Service's (UPS) Motion for Summary Judgment. (Ct. Rec. 12.) Plaintiff Deanna Tabish-Weaver opposes the motion.<sup>1</sup> After reviewing the submitted material and applicable authority, the Court is fully informed and for the reasons set forth below grants UPS's motion.

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<sup>1</sup> Plaintiff's response was devoid of any legal authority and merely contained Plaintiff's statement of the facts and a brief argument.

1 **A. Background<sup>2</sup>**

2 Deanna Tabish-Weaver began working part time at UPS in 1979 at the  
3 Spokane, Washington facility. Ms. Tabish-Weaver became a full-time UPS  
4 package-car driver in 1986. At all times during her employment with  
5 UPS, Ms. Tabish-Weaver was represented by a union, the International  
6 Brotherhood of Teamsters Local 690, and her employment was subject to a  
7 collective bargaining agreement.<sup>3</sup>

8 In 1994, Ms. Tabish-Weaver took an approximately three-year leave  
9 of absence to serve as a union business agent. The union terminated  
10 Ms. Tabish-Weaver's employment in 1997, but, for medical reasons, she  
11 did not return to work at UPS until 1998.

12 In 1998, Ms. Tabish-Weaver was released to return to work part  
13 time, and UPS accommodated her by identifying a part-time position that  
14 she was medically and otherwise qualified to fill. In 1999, Ms.  
15 Tabish-Weaver's doctor released her to return to work full time (but not  
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17 <sup>2</sup> In ruling on a motion for summary judgment, the Court  
18 considered the facts and all reasonable inferences therefrom as  
19 contained in the submitted declarations, exhibits, and depositions, in  
20 the light most favorable to Plaintiff, the party opposing the motion.  
21 *See United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1972) (*per*  
22 *curiam*). The following factual recitation was created utilizing this  
23 standard, along with the parties' Joint Statement of Uncontroverted  
24 Facts (Ct. Rec. 29).

25 <sup>3</sup> Ms. Tabish-Weaver filed union grievances and made worker's  
26 compensation claims before 1998 and 1999; she experienced no problems  
27 or difficulties with UPS's prior accommodations.

1 as a driver), and UPS accommodated her by identifying a full-time  
2 position that she was medically and otherwise qualified to fill. In  
3 February 2001, Ms. Tabish-Weaver began a leave of absence due to a  
4 workplace injury - she had three surgeries related to his injury over  
5 the next year and a half.

6 In 2002, without being cleared to return to work, Ms. Tabish-Weaver  
7 made her first request for accommodation to UPS relating to her 2001  
8 injury. In response, UPS sought medical information regarding Ms.  
9 Tabish-Weaver's condition and ability to return to work. Ms.  
10 Tabish-Weaver initially did not provide UPS with the information it  
11 requested, and UPS followed up with her to obtain the information. Ms.  
12 Tabish-Weaver's health care provider subsequently provided UPS with  
13 incomplete information, and UPS once again followed up to obtain the  
14 information it had requested.

15 Ms. Tabish-Weaver was released to return to work in April 2003.  
16 Ms. Tabish-Weaver's doctor's report stated that she could lift up to 50  
17 pounds and perform various physical activities either frequently or  
18 continuously. Ms. Tabish-Weaver confirmed in her deposition that she  
19 could lift 50 pounds as of April 10, 2003. Her doctor's report also  
20 stated that Ms. Tabish-Weaver could only do sorting work on a twilight  
21 shift since this shift generally involved sorting lighter packages.

22 Ms. Tabish-Weaver's medical restrictions precluded her from doing  
23 most jobs at UPS's Spokane facility, but UPS's Workforce Planning  
24 Manager, Alton Edwards, met with Ms. Tabish-Weaver on June 12, 2003, to  
25 determine what jobs she could possibly perform, and began looking for  
26 suitable openings. On August 27, 2003, Mr. Edwards identified two vacant  
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1 part-time positions, a day-shift Revenue Auditor position and a twilight  
2 Small Sorts Sorter position, as potential candidates for combination  
3 into a full-time "combination" job.<sup>4</sup>

4 Ms. Tabish-Weaver testified in her deposition that she was looking  
5 for full-time work, that she had the "right" to go back to work full  
6 time, and that she was only willing to go back to work part time if she  
7 remained classified as a full-time employee with full-time benefits.

8 UPS package-sorting operations run on four shifts: preload, day,  
9 twilight, and night. In 2003, UPS's day shift typically started between  
10 8:30 and 9:00 a.m., and finished around 1:30 or 2:00 p.m. In 2003, UPS's  
11 twilight shift typically started around 5:00 p.m. and ended around 10:00  
12 p.m. Therefore, the available day-shift Revenue Auditor and twilight  
13 Small Sorts Sorter positions could only be combined into a full-time  
14 position if there was a break in the middle of the workday - a so-called  
15 "split shift." Mr. Edwards combined the two part-time positions into a  
16 split-shift combination position and offered the job to Ms.  
17 Tabish-Weaver. In a letter, Ms. Tabish-Weaver accepted this combination  
18 job, but noted that she was not giving up any rights that she might have  
19 under the collective bargaining agreement.

20 Ms. Tabish-Weaver returned to work on September 19, 2003.  
21 Immediately after the day shift, Ms. Tabish-Weaver reported for the  
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23 <sup>4</sup> The collective bargaining agreement provides for the  
24 combination of two part-time jobs into a full-time job; these jobs are  
25 called "Article 22.3" or "combination" jobs. The collective  
26 bargaining agreement also provides that union-represented positions at  
27 UPS are to be filled on the basis of seniority.

1 Small Sorts Sorter job; however, she was advised there was no work to do  
2 because there was a three-hour gap between the end of her day shift and  
3 th start of the twilight shift. Instead of waiting for the twilight  
4 shift to begin, she went home and did not return for the twilight shift.  
5 The next two days proceeded similarly. Unhappy with that she was not  
6 allowed to perform the Small Sorts Sorter job immediately following the  
7 end of the day shift, Ms. Tabish-Weaver asked to speak with Mr. Edwards  
8 and also contacted her union business agent because she believed that  
9 the collective bargaining agreement entitled her to work full time  
10 without a split shift.

11 On September 23, 2003, Ms. Tabish-Weaver's union business agent,  
12 Terry Moser, called Mr. Edwards and told him that either UPS would have  
13 to provide Ms. Tabish-Weaver with eight continuous hours of work or the  
14 company would face a grievance for a contractual pay claim for every day  
15 that she worked a split shift. UPS withdrew the accommodation offer on  
16 September 24, 2003, and placed Ms. Tabish-Weaver back on state  
17 industrial.

18 Ms. Tabish-Weaver testified at her deposition that she would have  
19 agreed to continue to work the split shift on a temporary basis while  
20 she grieved whether split shifts were proper under the collective  
21 bargaining agreement. On November 13, 2003, UPS offered to place Ms.  
22 Tabish-Weaver in a part-time position. Ms. Tabish-Weaver responded to  
23 UPS's offer by letter dated November 14, 2003, but did not return a  
24 signed accommodation agreement to UPS within the time specified in UPS's  
25 offer. UPS subsequently withdrew its offer.

26 In February 2004, the Washington State Department of Labor and  
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1 Industries determined Ms. Tabish-Weaver was totally disabled.

2 **B. Standard**

3 Summary judgment is appropriate if the "pleadings, depositions,  
4 answers to interrogatories, and admissions on file, together with the  
5 affidavits, if any, show that there is no genuine issue as to any  
6 material fact and that the moving party is entitled to judgment as a  
7 matter of law." FED. R. CIV. P. 56(c). Once a party has moved for  
8 summary judgment, the opposing party must point to specific facts  
9 establishing that there is a genuine issue for trial. *Celotex Corp. v.*  
10 *Catrett*, 477 U.S. 317, 324 (1986). If the nonmoving party fails to make  
11 such a showing for any of the elements essential to its case for which  
12 it bears the burden of proof, the trial court should grant the summary  
13 judgment motion. *Id.* at 322. "When the moving party has carried its  
14 burden of [showing that it is entitled to judgment as a matter of law],  
15 its opponent must do more than show that there is some metaphysical  
16 doubt as to material facts. In the language of [Rule 56], the nonmoving  
17 party must come forward with 'specific facts showing that there is a  
18 genuine issue for trial.'" *Matsushita Elec. Indus. Co. v. Zenith Radio*  
19 *Corp.*, 475 U.S. 574, 586-87 (1986) (citations omitted).

20 When considering a motion for summary judgment, a court should not  
21 weigh the evidence or assess credibility; instead, "the evidence of the  
22 non-movant is to be believed, and all justifiable inferences are to be  
23 drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255  
24 (1986). This does not mean that a court will accept as true assertions  
25 made by the non-moving party that are flatly contradicted by the record.  
26 See *Scott v. Harris*, 127 S. Ct. 1769, 1776 (2007) ("When opposing  
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1 parties tell two different stories, one of which is blatantly  
2 contradicted by the record, so that no reasonable jury could believe it,  
3 a court should not adopt that version of the facts for purposes of  
4 ruling on a motion for summary judgment.").

5 **C. Authority and Analysis**

6 1. Failure to Accommodate Claims

7 The American with Disabilities Act provides, in relevant part:

8 [n]o covered entity shall discriminate against a qualified  
9 individual with a disability because of the disability of such  
10 individual in regard to job application procedures, the  
11 hiring, advancement, or discharge of employees, employee  
compensation, job training, and other terms, conditions, and  
privileges of employment.

12 42 U.S.C. § 12112(a). In order to establish a failure to accommodate  
13 claim under the ADA, the plaintiff must establish that (1) she is an  
14 individual with a disability, (2) that the employer knew of the  
15 disability, and (3) that she is otherwise qualified to perform the  
16 essential functions of the job sought with or without reasonable  
17 accommodation. *Winfrey v. City of Chicago*, 259 F.3d 610, 614 (7th Cir.  
18 2001); 42 U.S.C. § 12111. The plaintiff bears the initial burden of  
19 proposing an accommodation that is reasonable and allows her to perform  
20 the job's essential functions. *Hedrick v. W. Reserve Care Sys.*, 355 F.3d  
21 444, 457 (6th Cir. 2004); *Lucas v. W.W. Grainger, Inc.*, 257 F.3d 1249,  
22 1255-56 (11th Cir. 2001). A reasonable accommodation includes:

23 (A) making existing facilities used by employees readily  
24 accessible to an usable by individuals with disabilities; and

25 (B) job restructuring, part-time or modified work schedules,  
26 reassignment to a vacant position, acquisition or modification  
27 of equipment or devices, appropriate adjustment or  
modifications of examinations, training materials or policies,  
the provision of qualified readers or interpreters, and other  
similar accommodations individuals with disabilities.

1 42 U.S.C. § 12111(9). However, an employer is not required to displace  
2 other employees in order to accommodate a disabled employee nor create  
3 a new position. *Hedrick*, 355 F.3d at 457; *Cassidy v. Detroit Edison*  
4 *Co.*, 138 F.3d 629 (6th Cir. 1998).

5 Even assuming Ms. Tabish-Weaver is an individual with a disability,  
6 the Court concludes she did not present sufficient evidence establishing  
7 a genuine issue of material fact as to whether UPS failed to reasonably  
8 accommodate her disability. There is no dispute that Ms. Tabish-Weaver  
9 could no longer serve as a package car driver and that UPS accommodated  
10 her physical limitations from 1998-2001. In 2002, however, when Ms.  
11 Tabish-Weaver was released to work full time by her doctor, UPS  
12 concluded that she did not qualify for any available full-time  
13 positions. Ms. Tabish-Weaver does not dispute this; rather, she argues  
14 that UPS's combination split-shift position was an unreasonable  
15 accommodation. The Court disagrees.

16 First, there is no evidence to support Ms. Tabish-Weaver's  
17 assertion that the collection bargaining agreement entitled her to work  
18 a "continuous" combination job under these circumstances. Second, UPS  
19 was not required under the ADA to allow Ms. Tabish-Weaver to work these  
20 two part-time positions continuously because the essential functions<sup>5</sup> of  
21 the positions were connected to their respective shifts. Although job  
22 restructuring is a possible accommodation under the ADA, UPS was not  
23 required to reallocate the essential functions of these positions to  
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25 <sup>5</sup> Essential functions are "the fundamental job duties of the  
26 employment position [the disabled employee] holds or desires." 29  
27 C.F.R. § 1630.2(n)(1).



1 accommodate Ms. Tabish-Weaver's continuous split-shift request. See  
2 *Jackson v. City of Chicago*, 414 F.3d 806, 813 (7th Cir. 2005); *Benson v.*  
3 *N.W. Airlines*, 62 F.3d 1108, 1112-14 (8th Cir. 1995). This is because  
4 an accommodation is reasonable only if it enables the employee to  
5 perform the essential functions of the job. *Lucas*, 257 F.3d at 1259-60;  
6 *Smith v. Blue Cross Blue Shield of Kan.*, 102 F.3d 1075, 1076 (10th Cir.  
7 1996). Ms. Tabish-Weaver failed to present evidence to rebut UPS's  
8 assertion that the essential functions of these two part-time jobs were  
9 dependent upon their respective shifts. For these reasons, the Court  
10 concludes Ms. Tabish-Weaver failed to establish a triable issue of fact  
11 as to whether a reasonable accommodation was available. UPS's motion  
12 for entry of judgment in its favor on the failure to accommodate claim  
13 is granted.

14 2. Disparate Treatment and Retaliation Claims

15 In her response, Ms. Tabish-Weaver did not set forth any argument  
16 to oppose UPS's motion to dismiss her disparate treatment and  
17 retaliation claims. Accordingly, the Court grants UPS's motion.

18 **D. Conclusion**

19 Because Ms. Tabish-Weaver does not oppose dismissal of her  
20 disparate treatment and retaliation claims and the Court determines Ms.  
21 Tabish-Weaver failed to present sufficient evidence to survive summary  
22 judgment on her failure to accommodate claim, the Court need not address  
23 the definition of "disability" and the constitutional issue related  
24 thereto.

25 For the reasons given above, **IT IS ORDERED:**

26 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 12**) is  
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1 **GRANTED.**

2 2. **Judgment** is to be entered in Defendant's favor with prejudice.

3 3. This file shall be **CLOSED.**

4 **IT IS SO ORDERED.** The District Court Executive is directed to  
5 enter this Order and distribute copies to counsel and the Human Rights  
6 Commission.

7 **DATED** this 28<sup>th</sup> day of April 2008.

8  
9 S/ Edward F. Shea  
10 EDWARD F. SHEA  
11 UNITED STATES DISTRICT JUDGE

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